



State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

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February 24, 2003

John W. Bartlett, Esq.
Lowenstein Sandler, PC
65 Livingston Avenue
Roseland, New Jersey 07068-1791

Advisory Opinion No. 01-2003

Dear Mr. Bartlett:

Your request for an advisory opinion on behalf of the New Jersey Democratic State Committee (hereafter, NJDSC) was considered by the Commission at its meeting of February 24, 2003, and the Commission directed me to issue the following response pursuant to N.J.S.A. 19:44A-6f.

You have asked the following two questions: 1) whether or not the NJDSC, a State political party committee (PPC), pursuant to N.J.S.A. 19:44A-3p, may borrow money by means of a "mortgage loan" to purchase or refinance an interest in real property, if the mortgage loan is from an entity in the business of lending money, contains arm's length terms, is secured by an interest in real property and is for the purpose of purchasing a building and the land beneath it; and 2) whether or not such a "mortgage loan" constitutes a "contribution," as that term is defined in the New Jersey Campaign Contributions and Expenditures Reporting Act, N.J.S.A. 19:44A-1 et seq. (hereafter, the Act).

Please be advised that, pursuant to N.J.S.A. 19:44A-6f, this response is confined to the facts you have presented on behalf of the NJDSC only and is not intended to render an opinion as to facts relevant to any other political party committee. The Commission also notes that for the purposes of this response, the Commission defines the term "mortgage loan" to mean a "loan secured by a mortgage or deed of trust on real property." See Black's Law Dictionary 947 (7th ed. 1999).

Commission Opinion

The Commission finds that the NJDSC may borrow money by means of a mortgage loan to purchase an office building or to refinance its interest in that office building if the loan is made "in the ordinary course of business," as set forth below. The Commission concludes further that a mortgage loan obtained by the NJDSC "in the ordinary course of business" is not a "contribution," as that term is defined in the Act.

Discussion

You write that the NJDSC has signed a contract to purchase a building in Trenton to be used as a “primary workplace” for NJDSC business. The contract is at a “market value” purchase price, and the NJDSC “cannot, nor would it ever likely be able to, purchase the building for cash.” While the NJDSC has not yet entered into any loan agreement, you explain that it wishes to obtain a “market-rate loan” in order to purchase the building. You write further that the contract has a contingency permitting the NJDSC to withdraw if the Commission does not authorize the NJDSC to obtain a mortgage loan to purchase the building. The NJDSC will presumably be required to use its funds to make periodic payments on the mortgage loan.

1) The express purpose of the Act is to limit political contributions as a method of preventing undue influence upon candidates and committees subject to its provisions; see N.J.S.A. 19:44A-2. The Commission finds that a mortgage loan made to the NJDSC “in the ordinary course of business” to purchase an office building presents no opportunity for undue influence and is therefore permissible. If the mortgage loan satisfies the criteria described below, there is no opportunity for preferential treatment of the NJDSC that might result in undue influence.

The Commission notes that no provision of the Act specifically prohibits the NJDSC, a PPC as defined at N.J.S.A. 19:44A-3p, from obtaining a mortgage loan to purchase an office building at market value and from making periodic payments on that loan from funds contributed to the NJDSC. The Commission finds, however, that such a mortgage loan and payments must possess all of the following characteristics in order to avoid the possibility that the loan might be a source of undue influence.

A mortgage loan “in the ordinary course of business,” obtained by the NJDSC, the mortgagor, must: a) be from a banking or other institution in the business of making loans and authorized under New Jersey law to lend money that is secured by a mortgage; b) be at the “market rate” of interest with terms that are usual and customary for other similar loans made during the same period of time; c) be made on a basis that guarantees repayment; and, d) be evidenced by a written agreement containing a due date or amortization schedule. The Commission takes notice that these requirements are similar to the definition of a loan “in the ordinary course of business” found in the Federal Election Campaign Act; see 2 U.S.C.A. §431(8)(B)(vii). Also see 11 C.F.R. 100.82(a).

2) The definition of “contribution” in the Act includes “all loans. . . to or by any . . . political party committee”; see N.J.S.A. 19:44A-3d. The Act further establishes limits on the amounts of contributions, including loans, that may be accepted by a State PPC. A mortgage loan “in the ordinary course of business” must therefore be distinguished from a loan, such as a loan from an individual, that is a contribution subject to contribution limits.

The Commission finds that a mortgage loan to the NJDSC “in the ordinary course of business,” as described above, is not a contribution because the mortgage loan is an arm’s length commercial transaction with no intent or opportunity that any portion of the loan proceeds will become a contribution or exert undue influence. The Commission presumes that the proceeds of the NJDSC’s mortgage loan will be paid directly to the seller to purchase the office building and that no portion of the loan proceeds will be retained by the NJDSC. Further, because the mortgage loan is at a “market rate” of interest and bears terms that are usual and customary for other similar loans, there is no opportunity for a contribution to arise from a lower-than-market interest rate or other special terms

that might violate the contribution limits applicable to the NJDSC or the statutory prohibitions on certain contributions; see N.J.S.A. 19:44A-11.4 (as adjusted pursuant to N.J.S.A. 19:44A-7.2) and N.J.A.C. 19:25-11.2. Also see N.J.S.A. 19:34-32 and 19:34-45.

The Commission finds that the Act and Commission regulations lend support to this result. N.J.S.A. 19:44A-44 permits a gubernatorial candidate to borrow funds from a national or State bank in an amount up to \$50,000, which must be repaid in full no later than 20 days before the election. To implement this statutory provision, Commission regulations applicable to gubernatorial candidates specifically exclude “a loan in the ordinary course of business by a bank” from the definition of a contribution; see N.J.A.C. 19:25-15.3 and 19:25-16.3. Also, as you have noted, in Advisory Opinion 18-1977 the Commission distinguished a “commercially reasonable loan not intended to be a contribution” from a contribution in the form of a loan from an individual to a gubernatorial candidate.

The Commission notes that should any portion of the mortgage loan be forgiven, the forgiven amount would constitute a contribution from the mortgagee subject to the contribution limit to a PPC and to the prohibitions on contributions found at N.J.S.A. 19:34-32 or 19:34-45.

Additional Information

Please be advised that the Commission’s Compliance Section will provide you with specific written instructions for reporting the mortgage loan. You mentioned in your inquiry that the NJDSC may collect rents if it leases a portion of the office building. The issue of receipt and reporting of rental income is not addressed in this response. Please contact the Commission for guidance when you are able to provide specific information concerning receipt of rental payments.

The Commission is aware that provisions of the federal Bipartisan Campaign Reform Act of 2002 deal with the use of State political party committee funds for the purchase of a building. The Commission expresses no opinion as to application of that law to the mortgage loan that is the subject of this inquiry.

Thank you for submitting this request and for your interest in the work of the Commission.

Very truly yours,

ELECTION LAW ENFORCEMENT
COMMISSION

By: _____
NEDDA G. MASSAR
Acting Legal Director

FEB 13 2003



ADVISORY OPINION REQUEST

A person, committee or entity subject to, or reasonably believing he, she or it may be subject to, any provision or requirement of the Campaign Reporting Act may request that the Commission provide an advisory opinion pursuant to N.J.S.A. 19:44A-6. Such request must be in writing (please type or print) and must include the following:

1. This request for an Advisory Opinion is being submitted on behalf of:

Full Name of Person, Committee or Entity

New Jersey Democratic State Committee

Mailing Address
150 West State Street, 3rd Floor

Day Telephone No. **(609) 392-3367**

Trenton, New Jersey 08608

Evening Telephone No.

2. Indicate if the above named person, committee or entity currently files reports with the Commission:

Yes No

a. If yes, indicate in what capacity it is filing:

- | | | | |
|----------------------------------|-------------------------------------|---|--------------------------|
| Candidate committee | <input type="checkbox"/> | Recall committee | <input type="checkbox"/> |
| Joint candidates committee | <input type="checkbox"/> | Recall defense committee | <input type="checkbox"/> |
| Political committee | <input type="checkbox"/> | Lobbyist | <input type="checkbox"/> |
| Continuing political committee | <input type="checkbox"/> | Legislative agent | <input type="checkbox"/> |
| Political party committee | <input checked="" type="checkbox"/> | Personal financial disclosure statement | <input type="checkbox"/> |
| Legislative leadership committee | <input type="checkbox"/> | Other (please describe): _____ | <input type="checkbox"/> |

b. If no, indicate if the above named person, committee or entity has in the past filed reports with the Commission, giving elections (i.e., 1992 general election) or calendar years, and identify filing capacity:
N/A

c. If reports are or were filed under a different name than that appearing in 1 above, provide that name:
N/A

3. Please provide below a statement of the cognizable question of law arising under the Campaign Reporting Act, including specific citations to pertinent sections of the Campaign Reporting Act and Commission regulations (if known).

See Continuation Pages Attached

5. Please provide below a statement of the result that the person, committee, or entity seeks, and a statement of the reasoning supporting that result.

See Continuation Pages Attached

6. Person who is submitting request on behalf of committee or entity listed in Item 1 above:

Full Name: **John W. Bartlett, Esq.**

Mailing Address: **Lowenstein Sandler PC**

Day Telephone No.
(973) 597-2500

65 Livingston Avenue

Evening Telephone No.

Roseland, New Jersey 07068

Fax Number:
(973) 597-2447

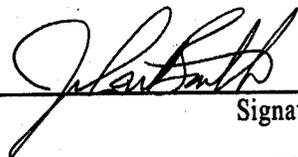
a. Official Capacity of Person Requesting Opinion:

- Candidate
- Treasurer
- Organizational Treasurer
- New Jersey Attorney representing requesting person, committee or entity
- Other (please describe): _____

7. I hereby consent to an extension of the 10-day response period provided in N.J.S.A. 19:44A-6f to a 30-day period for Commission response, which period shall start on the date of Commission receipt of the completed advisory opinion request. **(CROSS OUT THIS PARAGRAPH IF CONSENT IS WITHHELD).**

8. A request for an advisory opinion will not be considered filed until a fully completed and signed application is received by the Commission.

January 31, 2003
Dated:


Signature

3. **Please provide below a statement of the cognizable question of law arising under the Campaign Reporting Act, including specific citations to pertinent sections of the Campaign reporting Act and Commission regulations (if known).**

Whether a mortgage loan to a political party committee

- a) from an entity in the business of lending money,
- b) on arm's length terms,
- c) secured by an interest in real property, and
- d) for the purpose of purchasing a building and the land beneath it

constitutes a "contribution" within the meaning of N.J.A.C. 19:25-1.7 and N.J.A.C. 19:25-10.13.

4. Please provide below a full and complete statement of all pertinent facts and contemplated activities that are the subject of the inquiry. Your statement must affirmatively state that the contemplated activities have not already been undertaken by the person, committee or entity requesting the opinion and that the person, committee or entity has standing to seek the opinion, that is the opinion will affect the person's or committee's reporting or other requirements under the Act. (attach additional sheets if necessary).

Statement of Facts:

The New Jersey Democratic State Committee (the "Committee" or "DSC"), a political party committee, wishes to purchase a building in Trenton, New Jersey, to be used as the Committee's offices. This building would constitute the primary workplace where the Committee staff will carry out its business, including issue-oriented research, enhancement of party mailing lists, polling research, research on the legislative and administrative records of incumbent public office holders who are members of an opposition party, coordination of efforts supporting Democratic candidates in general elections in this state, and the raising of funds to support the above. The Committee has identified a building and signed a contract for its purchase at a market-value purchase price. The price of the building is such that the Committee cannot, nor would it ever likely be able to, purchase the building for cash. The Committee has not entered into a loan agreement with any lender.

The Committee submits this request to determine whether, under applicable law, a market-rate loan not intended to be a contribution and negotiated in an arm's-length transaction with a corporation that is in the business of lending money (hereinafter, the "lender" or "bank") constitutes a "contribution" as that term is defined in N.J.A.C. 25:1.7. No portion of the proposed loan would be guaranteed by any person or entity. Cf. N.J.A.C. 19:25-10.13b. The Committee respectfully submits that such a loan is permissible because the legislature's intent when adopting Title 19 – and ELEC's intent in promulgating rules thereunder – cannot reasonably have been to prevent political parties from taking a loan secured by a mortgage to purchase real estate.

The Committee has not undertaken yet the activities contemplated herein. (The contract contains a provision permitting the DSC to withdraw from it in the event that the Commission's response to this request does not permit a mortgage loan and the courts affirm such opinion.) The Committee has standing to seek this opinion, because it is a political party committee organized pursuant to N.J.A.C. 19:5-4 and it submits regular reports to ELEC. The

Advisory Opinion requested will affect the Committee's reporting and other requirements under the Act for the following reasons: the Committee would be obliged to report a bank loan pursuant to N.J.A.C. 19:25-10.13; the contemplated loan would otherwise exceed the contribution limits set forth in N.J.A.C. 19:25-11.2; and if considered a "contribution" the loan would arguably violate N.J.S.A. 19:34-45. (This request, however, does not require ELEC to construe N.J.S.A. 19:34-45, and is therefore amenable to resolution by an Advisory Opinion. As it did in Adv. Op. 09-1990, ELEC need only find that the proposed mortgage loan does not constitute a contribution under applicable regulations.)

5. Please provide below a statement of the result that the person, committee, or entity seeks, and a statement of the reasoning supporting that result.

A political party committee should be permitted to enter into an arm's length transaction with a professional lender, provided the transaction involves terms – such as interest rates, payment schedules, and securitization requirements – like those a similarly-situated non-political entity would receive. Therefore, The Committee requests the following finding:

A political party committee may borrow money secured by an interest in real property for the purpose of purchasing said property or re-financing its interest therein. Such a mortgage loan does not constitute a "contribution" as that term is defined in N.J.A.C. 19:25-1.7, provided that (a) the mortgagee is an entity in the business of making loans secured by an interest in real property, and (b) the mortgage loan constitutes an arm's length transaction and is not intended to be a contribution to the party committee.

Such a finding would be consistent with Advisory Opinion precedent and, the Committee submits, the legislative intent behind N.J.A.C. 19:25-10.13 and N.J.S.A. 19:34-45.

N.J.A.C. 19:25-10.13, provides that:

(a) A loan received by a candidate, candidate committee, joint candidates committee, political committee, continuing political committee, political party committee or legislative leadership committee, or by the treasurer of such committee, shall be reported as a contribution by the person or entity making the loan.

....

(c) A loan made by a banking or lending institution . . . is a contribution to the candidate by that banking or lending institution.

....

(e) A loan shall be reported as a contribution at the time it is received and is a contribution as long as it remains unpaid.

N.J.A.C. 19:25-10.13 (emphasis added). See also N.J.A.C. 19:25-1.7 (defining "contribution").

It is worth noting that this rule, if strictly construed, would contradict Title 19 itself, which forbids certain entities, including banks, from making partisan political contributions of any sort. See N.J.S.A. 19:34-45. ("No corporation carrying on the business of a bank . . . shall pay or contribute money or thing of value in order to aid or promote the nomination or election of any person, or in order to aid or promote the interests, success or defeat

of any political party.”) Yet N.J.A.C. 19:25-10.3c clearly anticipates that a political party committee might receive a loan from a “banking or lending institution.”

Taken together and in conjunction with the rest of Title 19 of the Administrative Code, this rule and statute compel the nonsensical conclusion that, to purchase a \$500,000 building, a political party committee would have to take a \$25,000 loan from each of 20 unaffiliated, non-bank lenders. See N.J.A.C. 19:25-11.2 (prescribing \$25,000 maximum contribution to a state political party committee from, among others, individuals and corporations); N.J.A.C. 19:25-11.9 (prohibiting affiliated organizations from making contributions which, in the aggregate, would exceed applicable limits). The Committee suggests that it is not the legislature’s intent to bar political party committees from purchasing, rather than renting, property on which to carry out their activities.

Rather, the intent of the statutes and regulations cited above is clear and appropriate: to prevent individuals and corporations from evading contribution limits by making a “loan” to a candidate or party for an amount higher than the limits and later forgiving part or all of the indebtedness. Such conduct is and should remain illegal. The Advisory Opinion the Committee requests is consistent with this approach. The Committee merely seeks, with respect to mortgage loans, an interpretation of N.J.A.C. 19:25-10.13 that is reasonable, and not overbroad or pernicious. Read literally, the rule confines political parties like the Committee to renting office space unless they have enough cash on hand to buy real property without a loan. This status quo benefits no one, and the suggested alternative – permitting political party committees to take loans secured by an interest in the real property they are purchasing with the loan proceeds, which loans are not intended by either party to be contributions – does not pose the kind of danger to free and fair elections that the law was designed to prevent.

The Commission’s own precedent supports the finding requested herein. In particular, Advisory Opinion 18-1977 states that

The Act includes ‘loans’ in the definition of contributions in Section 3d of the Act, and provides that for purposes of reports required under the Act, the contribution is deemed to be made at the time of the making of the loan. Accordingly, except in the case of a commercially reasonable loan not intended to be a contribution, the making of a loan . . . constitutes a contribution at the time when made.

(Emphasis added.) Thus, as far back as 1977, ELEC foresaw and acknowledged that a “commercially reasonable loan not intended to be a contribution” should not be considered a contribution.

ELEC precedent also supports the principle that a business entity engaged in its course of business – such as a bank engaging in the making of a loan secured by real property – ought not be considered a contributor. In Advisory Opinion 09-1990, the Commission held that a continuing political committee was permitted to receive contributions using a 900-number service provided by AT&T. While recognizing that “N.J.S.A. 19:34-45 prohibits a . . . telephone company from paying or contributing any money or thing of value [to a candidate, campaign or party],” the Commission was “satisfied . . . that the contractual agreement contemplated by these parties would not give rise to a ‘contribution’ by AT&T as the term is defined in N.J.S.A. 19:44A-3(d).” Adv. Op. 09-1990, at 3. ELEC so concluded because “AT&T is providing the 900 line telephone service as part of its normal business operations, and has specifically provided against the contingency that it will incur costs that Citizens will be unable to pay by including a ‘bad debts’ fund provision in its contract. Therefore, for purposes of the Reporting Act, AT&T will not be deemed as a ‘contributor’ under the submitted fact record.” *Id.* (Emphasis added.) A mortgage contract’s provisions allowing ejectment of the mortgagor and repossession of the property by the bank in the event of default is analogous to the “bad debts” provision of the contract in Adv. Op. 09-1990. Thus, the same safeguards ELEC sanctioned in the AT&T contract would be present in the mortgage agreement proposed here.

The New Jersey legislature, in passing the statutes that regulate gubernatorial campaign activity, has also recognized that arm’s-length loans from banking institutions are distinct from “contributions” as defined in N.J.A.C. 19:25-1.7. N.J.S.A. 19:25-15.3 states that a loan is not a contribution when it is “a loan in the ordinary course of business by a bank” and is otherwise compliant with the laws regulating loans to gubernatorial campaigns.

Finally, a mortgage loan to a political party committee is permissible under federal law. In clear terms, 2 U.S.C. §441b(b)(2) defines a loan to a candidate or political party as a contribution but specifically excludes “a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business.” Other provisions of the same Title, as amended by the Bipartisan Campaign Reform

Act of 2002, clearly anticipate that a political party will receive and make payments on loans. See, e.g., 2 U.S.C. §434(b)(2)(G) - (H).

The Committee proposes to report its proposed mortgage loan and payments thereon in the category of "loans" in its R-3 quarterly report (see, e.g., lines 9 and 17, at page 2) and Schedules B and F thereto, and in a similarly appropriate manner in its other periodic reports, unless ELEC instructs otherwise. Rents the Committee may collect if it leases a portion of the building would be reported as debts and obligations owed to the Committee (see, e.g., Schedule G to Form R-3), and would be received and used in a manner compliant with state and federal law.

For the foregoing reasons, the New Jersey Democratic State Committee respectfully requests an Advisory Opinion finding (i) that a political party committee may borrow money secured by an interest in real property for the purpose of purchasing said property or re-financing its interest therein; and (ii) that such a mortgage loan does not constitute a contribution as that term is defined in N.J.A.C. 19:25-1.7, provided that (a) the mortgagee is an entity in the business of making loans secured by an interest in real property, and (b) the mortgage loan constitutes an arm's length transaction and is not intended to be a contribution.